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No. 569

In the Supreme Court of the United States

OCTOBER TERM, 1939

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES FIDELITY AND GUARANTY COMPANY, A CORPORATION; J. M. BERNARDIN, TRUSTEE OF THE CENTRAL COAL AND COKE COMPANY; AND THE CENTRAL COAL AND COKE CORPORATION, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	3
Statement	3
Specification of errors to be urged	8
Summary of Argument	9
Argument:	
I. The judgment in Missouri was not conclusive in the Oklahoma suit as regards affirmative recovery on the counterclaim	13
A. No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided	14
B. No affirmative judgment could be rendered against the Indian Tribes in Missouri since Congress had not consented	20
C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma	23
II. The interveners are not "party defendants" within the Act of April 26, 1906, and their claim for affirmative relief should be dismissed	33
Conclusion	41
Appendix	42

CITATIONS

Cases:	
Adams v. *Murphy*, 165 Fed. 304	20, 21
Adams v. *United States*, 3 C. Cls. 312	11, 24, 27
Alabama Girls' Industrial School v. *Reynolds*, 143 Ala. 579	15
Bull v. *United States*, 295 U. S. 247	17, 18, 19
Burrow v. *Citizens' State Bank*, 74 F. 2d 929	39
Carr v. *United States*, 98 U. S. 433	12, 30
Case v. *Terrell*, 11 Wall. 199	14, 30
Chandler Co. v. *Brandtjen, Inc.*, 296 U. S. 53	40
Cherokee Nation v. *Georgia*, 5 Pet. 1	10, 20
Cherokee Nation v. *Hitchcock*, 187 U. S. 294	10, 21
Chicago B. & Q. Ry. Co. v. *Willard*, 220 U. S. 413	39
Chicot County Drainage Dist. v. *Baxter State Bank*, No. 122, this Term, decided January 2, 1940	30, 32

Cases—Continued.

	Page
Commonwealth v. *Matlack*, 4 Dall. (Pa.) 303	15
Commonwealth v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572	15
Commonwealth of Kentucky v. *Todd*, 9 Bush 708	15
De Groot v. *United States*, 5 Wall. 419	10, 14, 16, 24
French Republic v. *Inland Nav. Co.*, 263 Fed. 410	22
Gerding, Adm'x v. *United States*, 26 C. Cls. 319	14
Guaranty Trust Co. v. *United States*, 304 U. S. 126	23
Hall v. *United States*, 91 U. S. 559	17
Holmes v. *State*, 100 Ala. 291	15
Hudson Trading Co., Inc. v. *United States*, 28 F. 2d 744	30
Illinois Central R. R. Co. v. *Public Utilities Comm.*, 245 U. S. 493	11, 15, 22
Kalb v. *Feuerstein*, Nos. 120, 121, this Term	33
Kidder v. *Northwestern Mutual Life Ins. Co.*, 117 Fed. 997	40
Kingdom of Roumania v. *Guaranty Trust Co.*, 250 Fed. 341, certiorari denied, 246 U. S. 663	22
Leaner v. *K. & L. Box & Lumber Co.*, 6 F. 2d 666	40
Lee v. *Kaufman*, 15 Fed. Cas. No. 8191	14
Minnesota v. *United States*, 305 U. S. 382	12, 30
Mitchell v. *Maurer*, 293 U. S. 237	39
Munro v. *United States*, 303 U. S. 36	30
Nassau Smelting Works v. *United States*, 266 U. S. 101	15, 17
North Dakota-Montana W. G. Ass'n v. *United States*, 66 F. 2d 573, certiorari denied, 291 U. S. 672	16
Owen v. *United States*, 8 F. 2d 992	16
Patterson-MacDonald Shipbuilding Co., In re., 293 Fed. 192, certiorari denied *sub nom. McLean* v. *Australia*, 264 U. S. 582	22
People v. *Dennison*, 84 N. Y. 272	15
People v. *Miles*, 56 Cal. 401	15
Peterson v. *United States*, 26 C. Cls. 93	14
Price v. *United States and Osage Indians*, 174 U. S. 373	38
Real Estate Loan Co. v. *Brown*, 23 F. 2d 329	40
Reeside v. *Walker*, 11 How. 272	10, 11, 14, 15, 17, 24, 28
Republic of France v. *Pittsburgh S. E. Co. Inc.*, 112 Misc. 688	23
Schaumburg v. *United States*, 103 U. S. 667	14, 24
Schillinger v. *United States*, 155 U. S. 163	38
Siren, The, 7 Wall. 152	14
Stanley v. *Schwalby*, 162 U. S. 255	30
State v. *Gaines*, 46 La. Ann. 431	15
State v. *Leckie*, 14 La. Ann. 636	15
State v. *Liberty Oil Co.*, 154 La. 267	15
Stoll v. *Gottlieb*, 305 U. S. 165	30
Francis R. Tillou et al., Executors of Henry Eckford v. *United States*, 1 C. Cls. 220	25
Tillou et al., Executors v. *United States*, 6 C. Cls. 452	27
Thebo v. *Choctaw Tribe of Indians*, 66 Fed. 372	10, 12, 20, 21, 38

Cases—Continued. Page

Turner v. *United States*, 248 U. S. 354 ..... 10, 20, 21
United States Expansion Bolt Co. v. *H. G. Kroncke H. Co.*, 216 Fed. 186, 234 Fed. 868 40
United States v. *Algoma Lumber Co.*, 305 U. S. 415 .. 10, 17, 18, 21
United States v. *Creek Nation*, 295 U. S. 103 21
United States v. *Eastern Coal & Mining Co.*, 66 F. 2d 923 .. 4
United States v. *Eckford*, 6 Wall. 484 ..... 10, 11, 14, 15, 16, 17, 24, 25, 26, 28, 29
United States v. *Michel*, 282 U. S. 656 38
United States v. *Missouri-Kansas-Texas R. Co.*, 66 F. 2d 919 4
United States v. *Nipissing Mines Co.*, 206 Fed. 431, certiorari dismissed, 234 U. S. 765 ..... 14, 16
United States v. *Rea-Read Mill & Elevator Co.*, 171 Fed. 501 .. 21
United States v. *Shaw*, No. 570, this Term 14, 15, 24
United States v. *The Thekla*, 266 U. S. 328 15
United States v. *Various Articles of P. Property, etc.*, 11 F. Supp. 193 14
United States v. *Walker*, 109 U. S. 258 32
United States v. *Warren*, 12 Okla. 350 14
United States v. *Wickersham*, 10 Fed. 505 14

Statutes:

Act of March 3, 1797, c. 20, 1 Stat. 512, 515 15
Act of June 28, 1898, c. 517, Sec. 29, 30 Stat. 495 4
R. S., Sec. 951 (28 U. S. C., Sec. 774) 15
Act of April 26, 1906, c. 1876, 34 Stat. 137:
Sec. 11 42
Sec. 18 ..... 2, 3, 43
Tucker Act (28 U. S. C., Sec. 41 (20)) 16
28 U. S. C., Sec. 71 40

Miscellaneous:

106 A. L. R. 1245 14
40 Cong. Rec.:
P. 1260 ..... 21, 35
P. 3206 37
Pp. 3948, 5122, 5264 37
Equity Rules in 1912:
Equity Rule 30 40
Equity Rule 37 40
Federal Rules of Civil Procedure:
Rule 13 40
Rule 24 40
Rule 86 39
H. Rep. No. 163, 28th Cong., 1st Sess., pp. 2–5 (1844) .. 16, 24, 28
2 Moore, *Federal Practice:*
Sec. 24.02 39
Sec. 24.03 39
Sec. 24.12 40

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OPINIONS BELOW

The opinion of the circuit court of appeals (R. 123–129) is reported in 106 F. (2d) 804. The opinion of the district court (R. 108–115) is reported in 24 F. Supp. 961.

JURISDICTION

The judgment of the circuit court of appeals was entered on September 6, 1939 (R. 130). A timely (R. 131) petition for rehearing was denied on November 8, 1939 (R. 133). The petition for a writ of certiorari was filed on December 5, 1939, and was

granted on January 8, 1940. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

The United States, on behalf of the Choctaw and Chickasaw Tribes, filed a claim in a bankruptcy proceeding in a federal district court in Missouri. The trustee in bankruptcy filed counterclaims, which were allowed by the court. Judgment was entered that the United States, on behalf of the Tribes, take nothing, and that the credit against the Tribes be fixed at $9,060.90, to be secured and collected in the manner provided by law. No appeal was taken. The United States had also brought suit on behalf of the Tribes in a federal district court in Oklahoma against a surety for the bankrupt. The trustee in bankruptcy and a successor corporation of the bankrupt intervened and set up the same counterclaims and the Missouri judgment. Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 144, confers on the federal courts in Oklahoma jurisdiction to adjudicate counterclaims of "party defendants" in suits brought on behalf of the Choctaw and Chickasaw Tribes. The district court in Oklahoma held that the Missouri judgment was conclusive, and entered judgment that the Tribes take nothing against the surety and that the trustee recover $9,060.90 from the Tribes. The circuit court of appeals affirmed.

The questions presented are (1) whether the judgment or ascertainment by the federal court in Missouri of the balance due the counterclaimant was conclusive in the suit in Oklahoma, and (2) whether, under section 18 of the Act of April 26, 1906, the court in Oklahoma had jurisdiction over the counterclaims of the interveners.

STATUTE INVOLVED

The pertinent sections of the Act of April 26, 1906, c. 1876, 34 Stat. 137, providing for the settlement of claims against the Five Civilized Tribes, are set forth in the Appendix, *infra*, pp. 42–43.

STATEMENT

This action was brought in a federal district court in Oklahoma by the United States on its own behalf and on behalf of the Choctaw and Chickasaw Nations, to recover from the United States Fidelity and Guaranty Company, as surety for the Central Coal and Coke Company, certain unpaid royalties due on mining leases of tribal coal and asphalt lands (R. 9–13).

The pertinent facts may be summarized as follows:

Nature of the Controversy.—The claims and counterclaims which are involved in this action, and were involved in the reorganization proceedings in the federal District Court for the Western District of Missouri, hereinafter referred to, arise out of four mining leases of coal and asphalt deposits belonging to the Choctaw and Chickasaw

Tribes. The leases were made by the Mining Trustees of the Tribes, under authority of the Act of June 28, 1898, c. 517, sec. 29, 30 Stat. 495, 510 (R. 29, 35–37, 40–48, 103).

The Central Coal and Coke Company acquired these leases by assignment (R. 30, 35, 36, 103). The United States Fidelity and Guaranty Company is the surety on a bond guarantying performance of the two leases out of which the claims of the Tribes arise (R. 30, 48–50, 103). Whether it is a surety on the other two leases does not appear. The assignment of the leases to the Central Coal and Coke Company, referred to above, was with the consent of the surety (R. 30).

The leases provided for annual advance royalty payments to be credited against subsequent production, and also for so-called "deficit royalty" payments to be made in the event less than a specified minimum amount of coal was produced in any year (R. 40–48). The claims of the United States for the use of the Tribes are for advance royalties in the sum of $2,000 and for "deficit royalties" in the sum of $2,800,[1] which the Central Coal and Coke Company failed to pay in 1930 and 1931 on leases Nos. 1 and 2 (R. 30–31). The counterclaims are

[1] The claim for "deficit royalties" was waived in the district court in the present suit (R. 109), presumably because the Circuit Court of Appeals for the Tenth Circuit had held such royalties uncollectible. *United States* v. *Missouri-Kansas-Texas R. Co.*, 66 F. 2d 919 (C. C. A. 10, 1933); *United States* v. *Eastern Coal & Mining Co.*, 66 F. 2d 923 (C. C. A. 10).

for advance royalties paid for which the company asserts it should have been given credit against subsequent production, as follows: $773.52 on lease No. 1 (R. 32–33); $773.28 on lease No. 2 (R. 33–34); $4,300 on lease No. 3 (R. 58); and $4,300 on lease No. 4 (R. 58). A further counterclaim is made for $914.10 alleged to have been illegally exacted as "deficit royalties" on lease No. 3 (R. 35). The counterclaims total $11,060.90 (R. 39, 105).

Earlier Litigation.—On June 25, 1931, the United States, acting through the Superintendent of the Five Civilized Tribes, filed a claim on behalf of the Choctaw and Chickasaw Nations against the receiver of the Central Coal and Coke Company for delinquent advance and deficit royalties in the total amount of $4,800 (R. 31). This claim was filed in an ancillary receivership proceeding in the District Court for the Eastern District of Oklahoma, but by agreement between the United States Attorney for the Eastern District of Oklahoma and the receiver the claim was transferred to and treated as if filed in the District Court for the Western District of Missouri, where the original proceeding was pending (R. 32, 104). Thereafter that court approved a petition for corporate reorganization under Section 77B of the Bankruptcy Act (R. 23–24).

On June 19, 1935, J. M. Bernardin, trustee for the Central Coal and Coke Company, filed an answer to the claim of the United States and a cross claim (R. 32–37). The claim of the United States and the answer and cross claim of the trustee were

205294—40——2

referred to a Special Master, who allowed the Government's claim for advance royalties ($2,000), disallowed its claim for deficit royalties ($2,800), and allowed all the credits claimed by the trustee ($11,060.90) (R. 38, 50–59). On February 19, 1936, the District Court for the Western District of Missouri overruled exceptions to the Master's report and entered a judgment which, after confirming the report and offsetting the claims allowed to both parties, provided as follows:

> It is ordered, adjudged, and decreed that the United States in behalf of the Choctaw and Chickasaw Tribes take nothing by virtue of its said claim, and that the credit of Nine Thousand Sixty Dollars and Ninety Cents ($9,060.90) of the Central Coal and Coke Company be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law. To all of which the claimant excepts. (R. 59–60.)

No appeal was taken from this judgment (R. 105).

The Present Action.—On December 24, 1935, the United States on its own behalf and for the Choctaw and Chickasaw Tribes brought the present suit in the District Court for the Eastern District of Oklahoma (R. 9–13). No effort was made to bring the case to trial until the judgment of the District Court for the Western District of Missouri had been entered. Thereafter the trustee for the Central Coal and Coke Company and the Central Coal and Coke Corporation, which had taken over

the company's assets pursuant to court order in the reorganization proceedings, were permitted to intervene and set up on their merits the same counterclaims of the Central Coal and Coke Company which had been allowed in the Missouri proceeding, and also to set up the judgment of the District Court for the Western District of Missouri (R. 21–26). The defendant United States Fidelity and Guaranty Company then filed an amended answer in which it set up the judgment as a bar to the present action (R. 13–15). The Government filed a reply to the amended answer (R. 20), and an answer to the intervening petition (R. 27–29), in both of which it alleged that the judgment of the District Court for the Western District of Missouri was void because that court was without jurisdiction.

The material facts were stipulated by the parties (R. 29–90) and the case was submitted to the court without a jury. The Government, without in any way recognizing the validity of the counterclaims asserted, conceded that it was not entitled to recover from the surety unless the judgment of the District Court for the Western District of Missouri was void, and the district court concluded that unless that judgment was void no other question need be considered (R. 107). The court held that the District Court for the Western District of Missouri had jurisdiction of the parties and of the subject matter and that its judgment was valid and not subject to collateral attack (R. 107–115). On

September 3, 1938, the court entered a judgment for costs in favor of the United States Fidelity and Guaranty Company, and for the sum of $9,060.90 and interest in favor of the trustee of the Central Coal and Coke Company and against the Choctaw and Chickasaw Tribes (R. 116–117).

The judgment of the district court, except as to interest and costs, was affirmed by the circuit court of appeals. That court held, *inter alia:* (1) that "the Choctaw and Chickasaw Nations are sovereigns immune to civil suit except when expressly authorized;" (2) that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Nations because no such judgment was rendered; "the judgment of the court in Missouri merely adjudicated the respective amounts due on the claim and the counterclaim * * * and fixed the balance due on the counterclaim as against the Indian Nations at $9,060.90, to be secured and collected in the manner provided by law"; and (3) that this determination of the balance due the Central Coal and Coke Company was binding on the court in Oklahoma, so that the interveners in the Oklahoma proceeding were entitled to an affirmative judgment against the Indian tribes for $9,060.90 (R. 123–129).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that judgment of the federal district court in Missouri was conclusive in the suit in

the federal district court in Oklahoma as regards affirmative recovery on the counterclaims.

2. In holding that the federal district court in Oklahoma had jurisdiction to render an affirmative judgment against the Tribes in favor of the interveners.

SUMMARY OF ARGUMENT

I

The federal district court in Missouri allowed the cross-demand of the trustee of the Central Coal and Coke Company, and entered judgment (1) that the United States in behalf of the Tribes take nothing, and (2) that the credit of the company be fixed as against the Tribes in the amount of $9,060.90. The federal district court in Oklahoma held that this judgment was conclusive, both as barring recovery by the United States on behalf of the Tribes, and as establishing the right of the interveners to recover $9,060.90 from the Tribes.

The Government now concedes that the court in Missouri had jurisdiction to entertain and allow the company's cross-demands for the purpose of extinguishing the claims of the Tribes, and that its judgment was to that extent effective to bar recovery by the Tribes in Oklahoma. The Government contends, however, that the court in Missouri had no jurisdiction to render an affirmative judgment against the Tribes, and that its judgment was without effect and was not conclusive in the suit in Oklahoma.

A. No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided. *Reeside* v. *Walker,* 11 How. 272, 290; *De Groot* v. *United States,* 5 Wall. 419, 421, 431; *United States* v. *Eckford,* 6 Wall. 484, 489–491.

B. The Choctaw and Chickasaw Tribes are immune from suit except as Congress has otherwise provided. *Turner* v. *United States,* 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians,* 66 Fed. 372 (C. C. A. 8). Immunity from affirmative judgment by counterclaim is a part of immunity from suit; hence the Tribes are immune from counterclaim. The immunity of the Tribes from suit may at one time have sprung from their quasi-sovereign status, but it can now more realistically be rested on the degree of control which the United States exercises over them and the relationship, approximating that of guardian and ward, which exists between the United States and the Tribes. Compare *Cherokee Nation* v. *Georgia,* 5 Pet. 1, with *Cherokee Nation* v. *Hitchcock* 187 U. S. 294.

Congress has never consented generally that an affirmative judgment be entered against the Tribes in a suit by them or on their behalf. The Tucker Act does not apply to claims against Indian tribes. *United States* v. *Algoma Lumber Co.,* 305 U. S. 415. By the Act of April 26, 1906, c. 1876, sec. 18, 34 Stat. 137, set out *infra,* p. 43, Congress provided that the Five Civilized Tribes (which include the Choctaw and Chickasaw Tribes) should be subject to af-

firmative judgments by counterclaim in suits brought on their behalf in the federal courts of Oklahoma. This statute did not, however, authorize the affirmative judgment in the court in Missouri: consent to suit or counterclaim in one district is not operative elsewhere. *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma. The court below, while not deciding whether the court in Missouri had jurisdiction to render an affirmative judgment against the Tribes, held that the balance found by the court in Missouri was conclusive.

We have sought to show that the district court in Missouri had no jurisdiction to enter an affirmative judgment against the Tribes, and if a court is without jurisdiction to render a binding affirmative judgment, *a fortiori* no finding by it short of a judgment can be *res judicata*. This Court and the Court of Claims have taken this position in cases closely paralleling the present litigation. *United States* v. *Eckford*, 6 Wall. 484; *Adams* v. *United States*, 3 C. Cls. 312. Cf. *Reeside* v. *Walker*, 11 How. 272.

Nor was the judgment of the court in Missouri *res judicata* as to its jurisdiction to render an affirmative judgment or a conclusive finding against the Tribes. The *Eckford* decision stands in the

way of such a contention, as does the principle that the Attorney General or his subordinates cannot by their silence or acquiescence confer jurisdiction of a suit against the United States or the Tribes if Congress has withheld it. *Carr* v. *United States,* 98 U. S. 433; *Minnesota* v. *United States,* 305 U. S. 382.

II

The interveners are not "party defendants" within the Act of April 26, 1906, c. 1876, 34 Stat. 137. Congress, by section 18 of that Act, authorized the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and provided that parties defendant to such suits could have adjudicated any claims against the Tribes, and that any balance found due by the Tribes should be paid by the Treasurer of the United States out of funds of the Tribes. The affirmative judgment entered by the district court in this case, however, was not in favor of the defendant surety company, but of the interveners. The Act of April 26, 1906, should not be construed as allowing counterclaims by interveners. To do so would subject the Tribes to suit to a greater extent than Congress intended or provided. It is especially desirable that statutes waiving the immunity of Indian tribes from suit receive a narrow construction in view of the great number of claims, meritorious and otherwise, outstanding against them. See *Thebo* v. *Choctaw Tribe of Indians,* 66 Fed. 372, 376 (C. C. A. 8).

ARGUMENT

I

THE JUDGMENT IN MISSOURI WAS NOT CONCLUSIVE IN THE OKLAHOMA SUIT AS REGARDS AFFIRMATIVE RECOVERY ON THE COUNTERCLAIM

The federal district court in Missouri allowed certain of the claims of the Tribes, but also allowed the cross-demands of the trustee in bankruptcy for the Central Coal and Coke Company, and after striking the balance it entered judgment that the Tribes take nothing, and that the credit of the Company be fixed as against the Tribes in the amount of $9,060.90, to be secured and collected as provided by law (R. 59–60). The federal district court in Oklahoma held that this judgment was conclusive, both as barring recovery by the Tribes and as establishing the right of the Company to recover $9,060.90 from the Tribes, and it entered judgment accordingly (R. 116–117).

As explained *infra*, pp. 17–20, the Government does not now question that the court in Missouri had jurisdiction to entertain and allow the Company's cross-demands against the Tribes for the purpose of extinguishing the claims of the Tribes, or that its judgment was to that extent effective to bar recovery by the Tribes in the federal court in Oklahoma. The Government contends, however, that the district court in Missouri had no jurisdiction to render an affirmative judgment against the Tribes and that its judgment was without effect and was not conclusive in the suit in Oklahoma.

A. *No affirmative judgment can be rendered against the United States on a counterclaim unless Congress has so provided.*[2]

As will be shown, the Choctaw and Chickasaw Tribes occupy the same position as does the United States as respects the allowance of cross-demands against them without statutory authority, and the precedents are clear that no affirmative judgment can be entered against the United States on a counterclaim unless Congress has so provided. *Reeside* v. *Walker*, 11 How. 272, 290; *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484, 489–491; *The Siren*, 7 Wall. 152, 154; *Case* v. *Terrell*, 11 Wall. 199, 201; *Schaumburg* v. *United States*, 103 U. S. 667; *Lee* v. *Kaufman*, 15 Fed. Cas. No. 8191 (C. C. E. D. Va.); *United States* v. *Wickersham*, 10 Fed. 505, 508 (C. C. W. D. Tenn.); *United States* v. *Nipissing Mines Co.*, 206 Fed. 431, 434 (C. C. A. 2d), certiorari dismissed, 234 U. S. 765; *United States* v. *Various Articles of P. Property, etc.*, 11 F. Supp. 193, 194 (W. D. N. Y.); *Adams* v. *United States*, 3 C. Cls. 312, 333; *Peterson* v. *United States*, 26 C. Cls. 93, 98; *Gerding, Adm'x* v. *United States*, 26 C. Cls. 319, 323; *United States* v. *Warren*, 12 Okla. 350, 364 (1903); note.

[2] This point is more fully covered in the Government's brief in *United States* v. *Shaw*, No. 570, this Term, set for argument with the instant case. It is discussed here only in its aspects which are peculiarly relevant to this case, and in so far as is necessary to present this case in its proper perspective.

106 A. L. R. 1245; cf. *People* v. *Dennison*, 84 N. Y. 272, 281 (1881).[3] This doctrine is predicated on the principle that a sovereign cannot be sued without its consent, and this sovereign immunity extends to cross-claims and cross-demands for affirmative relief as much as to original suits.[4] "To permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit." *United States* v. *Eckford*, 6 Wall. 484, 490. See also *Reeside* v. *Walker*, 11 How. 272, 290.

No statute has been enacted consenting to the entry of an affirmative judgment against the United States on a counter claim. By the Act of March 3, 1797, c. 20, Sec. 4, 1 Stat. 512, 515, and its successor legislation (R. S. 951, 28 U. S. C., Sec. 774), Congress provided that in suits brought by the United States no claim for a credit shall be

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[3] The admiralty cases, such as *United States* v. *The Thekla*, 266 U. S. 328, are discussed and distinguished in the Government's brief in *United States* v. *Shaw*, No. 570, this Term.

[4] *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106; *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504–505. This same doctrine prevails in the States. *People* v. *Miles*, 56 Cal. 401 (1880); *Commonwealth of Kentucky* v. *Todd*, 9 Bush 708, 716 (Ky. 1873); *Commonwealth* v. *Owensboro & Nashville R. R. Co.*, 81 Ky. 572, 574 (1884); *State* v. *Leckie*, 14 La. Ann. 636, 638 (1859); *State* v. *Gaines*, 46 La. Ann. 431, 432 (1894); *State* v. *Liberty Oil Co.*, 154 La. 267, 270 (1923); *People* v. *Dennison*, 84 N. Y. 272, 281 (1881); *Commonwealth* v. *Matlack*, 4 Dall. 303 (Pa. 1804); see also *Holmes* v. *State*, 100 Ala. 291, 294 (1893); *Alabama Girls' Industrial School* v. *Reynolds*, 143 Ala. 579, 583 (1904).

admitted, except in certain enumerated circumstances, unless it has been presented to and disallowed by the General Accounting Office (formerly the accounting officers of the Treasury). Under this statute a defendant in a suit by the United States can, if he has complied with the statute, interpose crossclaims by way of reduction or extinguishment of the Government's demand. But it is well settled that the Act of 1797 does not permit an affirmative judgment. *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484; *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2), certiorari dismissed, 234 U. S. 765.[3]

The Tucker Act, 28 U. S. C. Sec. 41 (20), confers no such authority. It authorizes original suits against the United States in the district courts but it is apparently not broad enough to permit the recovery of demands upon counterclaims, even where the balance is less than $10,000. *United States* v. *Nipissing Mines Co.*, 206 Fed. 431 (C. C. A. 2). Cf. *North Dakota-Montana W. G. Ass'n* v. *United States*, 66 F. 2d 573, 577–578 (C. C. A. 8); certiorari denied, 291 U. S. 672; *Owen* v. *United States*, 8 F. 2d 992, 993 (C. C. A. 5). In any event, the Tucker Act is not applicable in any way

[3] In H. Rep. No. 163, 28th Cong., 1st Sess. (Ser. No. 445), pp. 2–5 (1844), the House Judiciary Committee pointed out that Congress had not conferred on the federal courts jurisdiction to render affirmative judgments on counterclaims interposed by a defendant.

to claims against an Indian tribe. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

It is, indeed, doubtful in what circumstances a defendant sued by the United States can, in the absence of statutory consent, interpose cross-claims even solely for the purpose of defeating the claim against him. This Court has several times stated, sometimes with reference to the Act of 1797 and sometimes generally, that a defendant in a suit by the Government cannot interpose claims for credit, even solely by way of reduction or extinguishment of the Government's demand, unless he can bring himself within some particular permissive statute of Congress. See, e. g., *Nassau Smelting Works* v. *United States*, 266 U. S. 101, 106; *Hall* v. *United States*, 91 U. S. 559, 562; *United States* v. *Eckford*, 6 Wall. 484, 488; *Reeside* v. *Walker*, 11 How. 272, 290.

In *Bull* v. *United States*, 295 U. S. 247, 261, however, the Court stated that a claim arising out of the same transaction from which the Government's demand stems can be set up as a defense to the Government's demand by way of recoupment and credit. The Court plainly meant that such a recoupment was permissible without statutory authority, and undoubtedly intended to draw a distinction between cross-demands unrelated or only remotely related to the Government's demand and those so closely related to the Government's claim that they might be considered as defensive matter

rather than as independent cross-actions. See 295 U. S. at 262. This is, in essence, the distinction between the common-law defense of recoupment and the purely statutory remedy of set-off.

The distinction of the *Bull* case, apart from questions of statutes of limitations, is for the most part academic as regards the United States, since defendants will ordinarily comply with the Act of 1797 rather than take the chance that their cross-demands may be allowed by way of recoupment without statutory authority. It is, however, not academic as regards Indian tribes in general, or the Choctaw and Chickasaw Tribes in particular, since there is no statutory authority for set-off against them, aside from the Act of April 26, 1906 (set out *infra*, p. 43), which confers on the federal courts in Oklahoma jurisdiction of cross-demands against the Five Civilized Tribes in certain suits brought on their behalf. The Act of 1797 plainly does not apply to credits against Indian tribes in suits brought by the United States on behalf of the tribes. The General Accounting Office has no jurisdiction over claims against Indian tribes, and the 1797 Act undoubtedly had reference only to suits by the United States in its own behalf and to cross-demands against the United States itself. Cf. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415.

The federal court in Missouri, therefore, had no jurisdiction to entertain a set-off against the claims

filed by the United States on behalf of the Choctaw and Chickasaw Tribes. The trustee could, however, under the doctrine of the *Bull* case, set up by way of recoupment, and as a defense, claims of the bankrupt against the Tribes arising out of the same transactions out of which the claims of the Tribes against the bankrupt arose. The claims of the Tribes which were allowed by the court were for $2,000.00, and arose out of coal leases Nos. 1 and 2 (R. 31, 55). The trustee was allowed credits totaling $1,546.80 arising out of these two leases, and credits totaling $9,514.10 arising out of leases Nos. 3 and 4 (R. 56–58). Allowance of the credits arising out of the two leases under which the claims of the Tribes derived—leases Nos. 1 and 2—was undoubtedly permissible as a defense or recoupment. It is very doubtful, on the other hand, whether the credits arising out of leases Nos. 3 and 4 were permissible recoupments, that is, whether they arose out of the same transaction as the claims of the Tribes. If not, a judgment for a balance of $453.20 should have been entered for the Tribes. The Government does not, however, wish to press on this review the question whether the cross-demands under leases Nos. 3 and 4 were permissable recoupments for the purpose of extinguishing the claims of the Tribes. It may be desirable that the defense of recoupment cover all claims as nearly related to the plaintiff's demand as were all the cross-claims in this suit, since they obviously

do not pose the problems which would arise if, for instance, the attempt were to interpose a set-off arising out of dealings with one department of the Government where the main suit arose out of wholly distinct transactions with another department.

But the court in Missouri went beyond recoupment or even set-off, and entered an affirmative judgment against the United States. This it had no power to do.

B. *No affimative judgment could be rendered against the Indian tribes in Missouri since Congress had not consented*

The Choctaw and Chickasaw Tribes cannot be sued except when Congress has so authorized. *Turner* v. *United States*, 248 U. S. 354, 358; *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372 (C. C. A. 8); *Adams* v. *Murphy*, 165 Fed. 304 (C. C. A. 8). The court below so recognized (R. 128–129), and respondents so concede (Br. in Opp., p. 10). The exemption of Indian tribes from suit except as Congress provides might once have derived from the quasi-sovereign status of certain of the tribes, which was formerly comparable in some respects to that of States of the union. See *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 374–376. Cf. *Cherokee Nation* v. *Georgia*, 5 Pet. 1. Its present basis, however, is doubtless the degree of control which the United States has long exercised over the Indian tribes, including the Choctaws and

Chickasaws, and the relationship between the tribes and the United States, which is comparable to that of guardian and ward. See *Turner* v. *United States*, 248 U. S. 354, 358; *United States* v. *Creek Nation*, 295 U. S. 103, 109–110; *Cherokee Nation* v. *Hitchcock*, 187 U. S. 294, 305–306. It seems clear, therefore, that the exemption of the Tribes is the same as that of the United States, though the Tribes are not, in any ordinary sense, agencies or instrumentalities of the United States.

Congress, to prevent the Indian tribes from being harassed by frivolous claims and expensive litigation, has never given any general consent to suits against them. *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372, 376; *Adams* v. *Murphy*, 165 Fed. 304, 309. See 40 Cong. Rec., p. 1260 (1906). As has been stated, the Tucker Act does not apply to claims against Indian tribes. *United States* v. *Algoma Lumber Co.*, 305 U. S. 415. It is true that Congress has expressly subjected the Five Civilized Tribes to affirmative judgments on claims interposed by the "party defendants," but only in suits brought by the Government on behalf of the Tribes in the federal courts of Oklahoma. Act of April 26, 1906, c. 1876, Sec. 18, 34 Stat. 137, 144, set out *infra*, p. 43.[6] This Act confers no such jurisdiction on

[6] The Act (Sec. 18) confers jurisdiction on "the United States courts in Indian Territory." The federal district courts in Oklahoma have succeeded to this jurisdiction. See *United States* v. *Rea-Read Mill & Elevator Co.*, 171 Fed. 501, 512 (C. C. E. D. Okla.).

the district courts in Missouri; while it did not deprive other federal courts of their general jurisdiction, it conferred no special jurisdiction on courts other than the federal courts of Oklahoma. And consent to be sued in one district on a counterclaim is not to be construed as authorizing such suits elsewhere. *Illinois Cent. R. R. Co.* v. *Public Utilities Comm.*, 245 U. S. 493, 504.

Since the Indian tribes are exempt from direct suit except with the consent of Congress, the United States does not by coming into court on their behalf subject them to affirmative liability by way of counterclaim.[7] It has already been shown that the United States does not by suing subject itself to affirmative judgment by counterclaim, and that the immunity of the tribes from suit is probably identical with that of the United States. If, however, the Indian tribes are more to be compared to foreign sovereigns, such sovereigns do not subject themselves to liability on a counterclaim by the mere act of bringing suit. *Kingdom of Roumania* v. *Guaranty Trust Co.*, 250 Fed. 341, 344 (C. C. A. 2), certiorari denied, 246 U. S. 663; *French Republic* v. *Inland Nav. Co.*, 263 Fed. 410, 413 (E. D. Mo.); *In re Patterson-MacDonald Shipbuilding Co.*, 293 Fed. 192, 193 (C. C. A. 9), certiorari denied, *sub nom. McLean* v. *Australia*, 264 U. S. 582;

[7] Respondents so concede (Br. in Opp. p. 10).

Republic of France v. *Pittsburgh S. E. Co., Inc.*, 112 Misc. 688 (N. Y., 1920).[8]

C. The judgment of the federal court in Missouri was not conclusive in the suit in Oklahoma

The judgment of the federal district court in Missouri was "that the United States in behalf of the Choctaw and Chickasaw Tribes take nothing," and that the credit of the company in the amount of $9,060.90 "be and is hereby fixed as against the Choctaw and Chickasaw Tribes and to be secured and collected in the manner provided by law" (R. 60). The court below said that it was unnecessary to determine whether the court in Missouri had jurisdiction to render an affirmative judgment against the Indian Tribes because it had not done that but had merely fixed the balance due from the Tribes to the Company, and the court below held that the balance found by the court in Missouri was conclusive in the suit in Oklahoma (R. 128).

We have sought to show that the district court in Missouri had no jurisdiction to enter an affirmative judgment against the Tribes, and it seems obvious that that court purported to do just that. But even accepting the interpretation of the judgment of the court in Missouri which was adopted by the

[8] In *Guaranty Trust Co.* v. *United States*, 304 U. S. 126, 134, the Court enumerated various liabilities to which a foreign sovereign subjects itself by appearance as a suitor in a domestic forum. Susceptibility to an affirmative judgment by counterclaim is, significantly, not mentioned.

court below, that judgment was not binding in the suit in Oklahoma.

If a court is without jurisdiction to render a binding affirmative judgment against the United States or the Indian tribes, *a fortiori* no finding by it short of a judgment can be *res judicata*. Such a court may, for what it is worth, state the balance it believes to be due the defendant over and above the amount used to extinguish the claim of the United States or the tribes, even though it has no jurisdiction to render an affirmative judgment against them.[9] Congress, if it sees fit, can settle a claim on the basis of such an ascertainment, although no instance of its ever having done so is known.[10] But the balance so fixed would not be binding in subsequent judicial proceedings. This Court and the Court of Claims have so held in *United States* v. *Eckford*, 6 Wall. 484, and *Adams* v. *United States*, 3 C. Cls. 312. Long ago the House Judiciary Committee expressed a similar opinion. H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445) (1844). And compare *Reeside* v. *Walker*, 11 How. 272.

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[9] See *De Groot* v. *United States*, 5 Wall. 419, 431; *United States* v. *Eckford*, 6 Wall. 484, 491; *Schaumburg* v. *United States*, 103 U. S. 667. The *Schaumburg* case held that a refusal to make such a finding was not reviewable.

[10] The practice of Congress in this respect is discussed in the Government's brief in *United States* v. *Shaw*, No. 570 this Term, set for argument with the instant case. See also *infra*, pp. 28–29.

1. The *Eckford* case may be summarized as follows: The United States in 1839 brought an action in the federal circuit court in New York to recover from a surety for the defalcation of his principal. The defendants, Eckford's executors, interposed certain set-offs. The jury found that there was due from the United States to the defendants $20,545.59. On this verdict there was entered a judgment "that the United States of America take nothing by their said bill, and that the defendants do go thereof without day; and that the said surviving executors are entitled to be paid the said balance so certified by the jurors aforesaid."

The claim not being paid, the executors brought suit against the United States in the Court of Claims, and offered the record of the circuit court in evidence. Upon these facts, the Court of Claims decided: (1) That the circuit court had jurisdiction of the subject matter of the suit, and the set-off pleaded. (2) That the finding of the jury and the determination of the court constituted, in substance and effect, a valid and binding judgment against the United States for the sum certified by the jury. (3) That such judgment could not be impeached in a collateral suit. The Court of Claims, therefore, refused to reexamine the merits of the claim and entered a judgment against the United States for the sum of $20,545.59. *Francis R. Tillou et al., Executors of Henry Eckford* v. *United States*, 1 C. Cls. 220.

On appeal to this Court that judgment was reversed, *sub nom. United States* v. *Eckford*, 6 Wall. 484. In a unanimous opinion this Court held that the circuit courts could not exercise jurisdiction in suits against the United States unless the claimant could bring his case within some act of Congress; that the right of set-off did not exist at common law; that the Act of March 3, 1797, permitted a defendant to interpose properly audited claims in reduction of his alleged indebtedness, even to the discharge of the entire claim of the Government, but that this act did not confer "any jurisdiction upon the court to determine that the United States is indebted to the defendant for any balance, or to render judgment in his favor for the excess of the set-off over his indebtedness as proved in the trial" (p. 489); "that to permit a demand in set-off to become the foundation of a judgment would be the same thing as sustaining the prosecution of a suit" (p. 490); "that when the United States is plaintiff and the defendant has pleaded a set-off, which the acts of Congress have authorized him to do, no judgment can be rendered against the government, although it may be judicially ascertained that, on striking a balance of just demands, the government is indebted to the defendant in an ascertained amount" (p. 491). The judgment of the Court of Claims was therefore reversed, and the case was remanded. Pursuant to the mandate, the $20,545.59 judgment of the circuit court was reex-

amined and subsequently reduced to $4,827.51. *Tillou et al., Executors,* v. *United States,* 6 C. Cls. 452.

The Eckford litigation strikingly paralleled that in the instant case. In each a suit was brought by the United States, and the defendants interposed certain set-offs which exceeded the plaintiff's demands. In each case a judgment was rendered that the United States take nothing and that specific amounts were due and owing to the defendants. In each case the defendants attempted to enforce that "judgment" or "ascertainment" in a court which had jurisdiction to render a judgment against the plaintiff—the Court of Claims in the one case, and the district court in Oklahoma in the other. Each held that the prior "judicial ascertainment" of the amount due was conclusive and not subject to collateral attack and entered a judgment accordingly. We submit that the court below, as did the Court of Claims, committed reversible error.

2. In *Adams* v. *United States,* 3 C. Cls. 312, the United States had brought suit in the federal district court in California seeking an accounting as to certain liens for storage of a steam sawmill. The court found that $10,360 was due the defendants and payment was decreed. No appeal was taken by the Government. Adams, the assignee of the defendants in the California litigation, filed suit in the Court of Claims on the decree. He contended that the decree was *res judicata,* and that

no other evidence of his claim need be presented. The Court of Claims dismissed his petition, relying upon the *Eckford* case. It held (pp. 332–333) that set-offs could only be admitted as claims for credit and not as demands for judgment, and that any affirmative judgment for the excess was beyond the jurisdiction of the court in California and to that extent void.

3. H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445) represents one episode in the much litigated Reeside claim.[11] In 1839 the United States had brought suit in a federal court in Pennsylvania to recover $32,709 which was still allegedly due on Reeside's postal account. Reeside's executrix counterclaimed for a much larger sum, and the jury found that a balance of $188,496.06 was due the estate. There was "judgment on the verdict" in 1842. Mrs. Reeside then applied to Congress for relief, contending that the certificate of the jury and the judgment was binding on the United States "as a debt of record." In its report to the House on this claim, the Judiciary Committee in 1844 said (H. Rept. No. 163, 28th Cong., 1st sess. (Ser. No. 445), pp. 2–5):

> Your committee * * * come to the conclusion that the verdict, in an action by the United States for the recovery of a debt, should be a general one, either for or against the plaintiffs; and that the return of the verdict, and the judgment upon it, in the pres-

[11] See *Reeside* v. *Walker*, 11 How. 272.

ent instance, is a bar to any future claim by the Government against the estate of James Reeside. But, that, when the jury went further than a general finding for the defendant, and returned a "certificate" of a balance being due to him by the Government, it was extraneous, and was unauthorized by any law known to your committee. It can be considered in no other light than as the private opinion, or conclusion, of twelve men, as to the balance of complicated and confused accounts; but affords no *judicial evidence* that it is "a debt of record" * * * [12]

Nor can it be contended that the judgment of the court in Missouri was *res judicata* as to the jurisdiction of that court to render an affirmative judgment (or a conclusive finding) against the Indian Tribes. Such a contention could equally have been made in the *Eckford* case, and is tacitly, if not squarely, rejected by the decision of this Court in that case. The objections here raised as to the jurisdiction of the court in Missouri were not made in that court.

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[12] The report continues: "The United States may happen, in many cases, to be the debtor to the defendant, upon the final adjustment of complicated accounts; but it will require the enactment of a law of Congress to give authority to a jury to place the Government in that predicament, and by their verdict, or by any declaration of opinion accompanying their verdict, to afford evidence of the amount of the debt, so that it can receive the sanction of a judicial judgment, and be established as an incontrovertible or final 'debt of record.'"

As between private litigants a judgment of a court appears, at least in some circumstances, to be *res judicata* as to that court's jurisdiction over the controversy, not only if the jurisdictional issue was litigated but also if it could have been. *Chicot County Drainage Dist.* v. *Baxter State Bank*, No. 122 this Term, decided January 2, 1940. Compare *Stoll* v. *Gottlieb*, 305 U. S. 165. But it is plain that that rule does not apply where the jurisdictional issue is whether Congress has consented to the suit. To apply it there would defeat the principle that the Attorney General or his subordinates cannot by their silence, or even acquiescence, confer jurisdiction on a court of a suit against the United States if Congress has withheld consent to suit, since neither the Attorney General or any of his subordinates has been authorized to submit the United States to suit. *Case* v. *Terrell*, 11 Wall. 199, 202; *Carr* v. *United States*, 98 U. S. 433, 435–439; *Stanley* v. *Schwalby*, 162 U. S. 255, 270; *Munro* v. *United States*, 303 U. S. 36, 41; *Minnesota* v. *United States*, 305 U. S. 382, 388–389. In *Carr* v. *United States*, it was contended that judgments in certain earlier cases in which the United States Attorney had appeared were *res judicata*, but the Court rejected the contention because he had no authority to submit the United States to suit. See also *Hudson Trading Co., Inc.*, v. *United States*, 28 F. 2d 744 (C. C. A. 3).[18]

[18] The present litigation well illustrates the wisdom of the rule that the exemption of the United States and the Indian

There are other objections to any application of the doctrine of *res judicata* to the jurisdictional question here. The jurisdiction of the court in Missouri was not exceeded until that court entered the particular judgment it did. The court in Missouri had jurisdiction of the Government's suit for unpaid royalties; it had jurisdiction of the Company's cross-demands pleaded "by way of recoupment or credit"; it had jurisdiction to apply "sufficient of that due on the counterclaim to offset in full the claim"; and, if it saw fit, it could express its opinion as to how much it believed to be still due the defendant. If the court in Missouri, after examining the evidence, had entered a judgment that the United States take nothing, and that the Central Coal and Coke Company "go without day," there would be no question that the court was acting within its jurisdiction. It was not until the court went one step further and fixed the balance at $9,060.90 "to be secured and collected in the manner provided by law" that the present question of jurisdiction arose. And if the court below is correct in

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tribes from suit except as Congress has consented is not to be defeated by the silence or acquiescence of the Government's attorneys. There was, as will be shown, no reason to anticipate in advance that the court in Missouri would exceed its jurisdiction. And the Department of Justice was not informed by its local agents of the judgment which the court had entered until after the time for appealing from it had expired.

its assumption that this was nothing more than a "go-without-day" judgment, then the court in Missouri at no time exceeded its jurisdiction. In filing its claim for royalties, and in allowing defendants to plead other claims "by way of recoupment and credit," the Government was not obliged to assume that the court would do more than issue the usual "go-without-day" judgment.

The rule of the *Chicot County* case should not apply where the court exceeded its jurisdiction only in respect to the form of the decree ultimately entered.[14] To say the right to file a motion to vacate or modify the judgment constituted an opportunity to raise the jurisdictional issue would practically foreclose every collateral attack on a void judgment.

From still another view, the *Chicot County* case is inapplicable here. Congress has with abundant clarity indicated its intention that affirmative judgments should not be entered against the Indian Tribes save in the federal courts in Oklahoma. Since there is no question of its power so to provide, "considerations as to whether the issue of jurisdiction was actually contested * * * or

[14] Compare *United States* v. *Walker*, 109 U. S. 258, 266, where the Court said: "Although a court may have jurisdiction over the parties and the subject-matter, yet if it makes a decree which is not within the powers granted to it by the law of its organization, its decree is void."

whether it could have been contested are not applicable." *Kalb* v. *Feuerstein,* Nos. 120, 121, this Term.

II

THE INTERVENERS ARE NOT "PARTY DEFENDANTS" WITHIN THE ACT OF APRIL 26, 1906, AND THEIR CLAIM FOR AFFIRMATIVE RELIEF SHOULD BE DISMISSED

It has been shown that the action of the Missouri court, be it labeled a "judgment" or a "finding," is not binding insofar as it attempted conclusively to determine the balance which was due the Central Coal and Coke Company. But there remains one further question. Section 18 of the Act of April 26, 1906, c. 1876, 34 Stat. 137 (set out *infra,* p. 43), authorizes the Secretary of the Interior to bring suits on behalf of the Five Civilized Tribes in the federal courts of Oklahoma, and it allows the "party defendants" to such suits to set up and have adjudicated "any claim" they may have against those Tribes, and provides that any balance found due by the Tribes shall be paid by the Treasurer of the United States out of any funds of the Tribes. The court below held, contrary to the Government's contention, that this Act conferred on the courts in Oklahoma jurisdiction not only to adjudicate counterclaims set up by parties defendant, but also counterclaims interposed by interveners, and it entered judgment in favor of the intervenors on their counterclaims (R. 116–117). If the court

below was correct in its interpretation of the Act, the interveners' claims should go back to the district court to be determined on their merits; but if Section 18 of the Act of April 26, 1906, does not confer jurisdiction on the courts in Oklahoma over counterclaims of interveners, then the interveners' demand for affirmative relief should be dismissed.[18]

The defendant, the surety company, did not seek, and, of course, had no basis for seeking, an affirmative judgment against the Tribes. The "intervening petition," on the other hand, shows unmistakably that the primary purpose of the interveners was not to defeat the action against the surety company, but to secure affirmative judgment on their counterclaims against the Tribes (R. 21-23). The petition nowhere describes the interveners as defendants, or states that their interest in the litigation is limited to that of defendants. On the contrary, it asserts that in the proceeding in Missouri it was determined that a balance was owing to the trustee by the United States, and it prays that the judgment in Missouri be decreed to be valid, and that there be a determination of accounts between the interveners and the Tribes (R. 25). The order granting leave to intervene authorized the interveners generally "to file an intervening petition" and required the plaintiff to answer it (R. 26). The order in no manner indicates that

[18] In that event they may present their claim to the Secretary of the Interior as provided for in Section 11 of the Act of April 26, 1906, set out, *infra*, p. 42.

the interveners were to occupy the position of defendants. In view of these circumstances it seems clear that even if it be assumed that interveners might sometimes be parties defendants within the meaning of the Act of 1906, these interveners were not in this case.

The legislative history of Section 18 indicates that an intervener is not a party defendant within the meaning of that section. Section 18 as originally drafted contained no provision authorizing private claims against the Tribes to be adjudicated by the courts. Instead, claims were to be presented to and settled by the Secretary of the Interior, as provided in Section 11 of the statute as enacted (set out *infra*, p. 42). The first proposal to confer any jurisdiction on the courts was made by Mr. Stephens, of Texas, who introduced an amendment from the floor of the House which would have conferred jurisdiction on the Court of Claims to entertain suits against the Five Civilized Tribes (40 Cong. Rec., p. 1260). Mr. Curtis, who was in charge of the bill on the floor of the House and was chairman of the committee from which it was reported, opposed the amendment, on the ground that claims against the Tribes should be left to the Secretary of the Interior. He said, *inter alia* (40 Cong. Rec., p. 1260):

> * * * The effect of this amendment would be to open up the Court of Claims to parties who have claims, who have been coming before Congress for forty years in an

attempt to get into some court to prosecute old and unjust claims against the Indians. It would be an outrage upon these tribes to permit people to bring suits in the Court of Claims against them. All manner of claims could be trumped up against them under the amendment offered by the gentleman from Texas if it was adopted, and I sincerely hope it will be voted down.

* * * * *

The gentleman knows that for years people with old stale claims have been trying to get into the Court of Claims and mulct these Indian tribes, if they could. We believe that the Secretary of the Interior is honest, and that he will carefully investigate every claim that is filed, and that he will render such judgment as he thinks fair and proper in the case. We think it is proper to leave it in his hands.

The amendment was defeated. 40 Cong. Rec., p. 1260.

On March 1, 1906, the following amendment to Section 18 was proposed from the floor of the Senate and adopted:

Where suit is now pending, or may hereafter be filed, in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes, to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe, [and the same may be pleaded by

such party defendants as a counterclaim or set-off;] and any [amount] *balance* that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such *tribe or* tribes upon the filing of the decree of the court with him. (40 Cong. Rec., p. 3206.)

In joint conference the italicized words were added, and the bracketed words were stricken from the foregoing amendment, and as so modified it became law. 40 Cong. Rec. 3948, 5122, 5264. From these changes it is apparent that "any claim", whether it arose out of the same transaction and whether technically a set-off or not, could be interposed and adjudicated. But inasmuch as the House had disapproved an amendment subjecting the Tribes to suit generally, it is fair to assume that only "party defendants" (i. e., those persons sued by the Secretary of the Interior) were to be allowed recourse to the courts. All other claims were to be determined by the Secretary of the Interior pursuant to Section 11 of the Act.

If the district court can grant leave to intervene in the exercise of its discretion, and if interveners thus become "party defendants" who may, by the terms of the Act, interpose "any claim" against these Tribes, whether arising out of the same transaction or not, and whether acquired by assignment or otherwise, the Tribes will be subjected to a liability to suit obviously far greater than was contemplated by Congress, and the purpose of Section

11 to confer general authority on the Secretary of the Interior to dispose of claims against the Tribes will be in considerable measure defeated.

Statutes waiving immunity from suit receive a narrow construction. *Schillinger* v. *United States*, 155 U. S. 163, 166; *Price* v. *United States and Osage Indians*, 174 U. S. 373, 375–376; *United States* v. *Michel*, 282 U. S. 656, 659. This rule is especially applicable where the Indian tribes are involved. The resources of these Tribes are relatively limited, and, as stated by Mr. Curtis during the debate attending the passage of the Act (set out *supra*, pp. 35–36), the number and extent of the claims, meritorious or otherwise, outstanding against the tribes is overpowering. These factors were recognized by the Circuit Court of Appeals for the Eighth Circuit in *Thebo* v. *Choctaw Tribe of Indians*, 66 Fed. 372. It there said (66 Fed. at 376):

> As rich as the Choctaw Nation is said to be in lands and money, it would soon be impoverished if it was subject to the jurisdiction of the courts, and required to respond to all the demands which private parties chose to prefer against it. The intention of congress to confer such a jurisdiction upon any court would have to be expressed in plain and unambiguous terms. * * *

Other considerations point to the same result. In the present case the interveners—the trustee of the Central Coal and Coke Company and the Cen-

tral Coal and Coke Corporation—were not named parties defendant in the law action brought by the United States against the surety in the Oklahoma court, but became parties by intervening.[16] As has been pointed out, their primary purpose was not to defeat the action against the surety company, but to secure an affirmative judgment against the Indian tribes. And their claim for affirmative relief, it will be recalled, arose out of leases not involved in the suit filed against the surety.

The court below seems to have assumed that the 1912 Equity Rules, then in force,[17] governed the scope of intervention in this proceeding (R. 148–149). But the present action against the surety was one at law, where the right to intervene was a mooted question. See *Byrrow* v. *Citizens' State Bank*, 74 F. (2d) 929 (C. C. A. 5). Cf. 2 Moore, *Federal Practice*, secs. 24.02 and 24.03. Even conceding that the old Equity Rules were applicable to intervention in a law action, it is obvious that the interveners were attempting to assert rights not available to the surety and that they did not enter in subordination to the main action as

[16] Since the question now under discussion is jurisdictional, it is not material that the record fails to indicate an exception to the order granting leave to intervene. *Chicago, B. & Q. Ry. Co.* v. *Willard*, 220 U. S. 413, 419; *Mitchell* v. *Maurer*, 293 U. S. 237, 244.

[17] The Federal Rules of Civil Procedure, which became effective September 16, 1938, are not applicable because final judgment was entered in this case on September 3, 1938 (R. 116; see Rule 86).

required by Equity Rule 37.[18] While Equity Rule 30 authorized counterclaims under certain circumstances, the restrictive implications of Equity Rule 37 in almost all instances foreclosed a counterclaim by an intervener. *Chandler Co.* v. *Brandtjen, Inc.*, 296 U. S. 53, 58–59; *Leavet* v. *K. & L. Box & Lumber Co.*, 6 F. 2d 666 (N. D. Cal.).[19] In the *Brandtjen* case this Court pointed out, 296 U. S. at 56–59, that an intervener's legal position "differs essentially" from what it would have been had he been named a defendant originally. And it expressly disapproved a lower court decision (*United States Expansion Bolt Co.* v. *H. G. Kroncke H. Co.*, 216 Fed. 186 (D. Wis.), 234 Fed. 868 (C. C. A. 7)), insofar as it permitted an intervener to counterclaim for the infringement of patents other than those set out in the original bill.[20]

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[18] The relevant portion of Equity Rule 37 reads: "Anyone claiming an interest in the litigation may at any time be permitted to assert his right by intervention, but the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding."

[19] The subordination requirement was so restrictive that it was deliberately omitted from the new Rules (see Rules 13 and 24). Cf. 2 Moore, *Federal Practices*, 1938, sec. 24.12.

[20] Other situations where an intervener is not deemed a defendant for all purposes may be cited. For instance, the federal statutes allowing a "defendant" to remove a case from a state to a federal court (28 U. S. C. sec. 71) have been held not to authorize removal by an "intervener." *Kidder* v. *Northwestern Mut. Life Ins. Co.*, 117 Fed. 997 (C. C. Ind.), unless the facts indicate that the intervener was deliberately left out of the proceeding in an effort to circumvent the purpose of the removal statute. *Real Estate Loan Co.* v. *Brown*, 23 F. 2d 329 (N. D. Ga.).

In the light of this state of the law, even long after 1906, it seems clear that Congress by the Act of 1906 had no intention of permitting intervention, in a suit brought on behalf of the Tribes, for the purpose of litigating any and all claims against the Tribes.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed.

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Section 11 of the Act of April 26, 1906, c. 1876, 34 Stat. 137, 141.

SEC. 11. That all revenues of whatever character accruing to the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether before or after dissolution of the tribal governments, shall, after the approval hereof, be collected by an officer appointed by the Secretary of the Interior under rules and regulations to be prescribed by him; and he shall cause to be paid all lawful claims against said tribes which may have been contracted after July first, nineteen hundred and two, or for which warrants have been regularly issued, such payments to be made from any funds in the United States Treasury belonging to said tribes. All such claims arising before dissolution of the tribal governments shall be presented to the Secretary of the Interior within six months after such dissolution, and he shall make all rules and regulations necessary to carry this provision into effect and shall pay all expenses incident to the investigation of the validity of such claims or indebtedness out of the tribal funds: *Provided,* That all taxes accruing under tribal laws or regulations of the Secretary of the Interior shall be abolished from and after December thirty-first, nineteen hundred and five, but this provision shall not prevent the collection after that date nor after dissolution of the tribal government of all such taxes due up to and including December thirty-first, nineteen hundred and five, and all such taxes levied and collected after the thirty-first day of December, nineteen hundred and five, shall be refunded.

ction 18 of the Act of April 26, 1906, c. 1876, 34
137, 144.

SEC. 18. That the Secretary of the Interior is hereby authorized to bring suit in the name of the United States, for the use of the Choctaw, Chickasaw, Cherokee, Creek, or Seminole tribes, respectively, either before or after the dissolution of the tribal governments, for the collection of any moneys or recovery of any land claimed by any of said tribes, whether such claim shall arise prior to or after the dissolution of the tribal governments, and the United States courts in Indian Territory are hereby given jurisdiction to try and determine all such suits, and the Secretary of the Interior is authorized to pay from the funds of the tribe interested any costs and necessary expenses incurred in maintaining and prosecuting such suits: *Provided,* That proceedings to which any of said tribes is a party pending before any court or tribunal at the date of the dissolution of the tribal governments shall not be thereby abated or in anywise affected, but shall proceed to final disposition.

Where suit is now pending, or may hereafter be filed in any United States court in the Indian Territory, by or on behalf of any one or more of the Five Civilized Tribes to recover moneys claimed to be due and owing to such tribe, the party defendants to such suit shall have the right to set up and have adjudicated any claim it may have against such tribe; and any balance that may be found due by any tribe or tribes shall be paid by the Treasurer of the United States out of any funds of such tribe or tribes upon the filing of the decree of the court with him.

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